(26)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 785

MAURICE LEVY,

Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ANDREW B. TRUDGIAN,
Counsel for Petitioner.

THE COURT PRESS, N. Y. C.

INDEX.

	PAGE
Petition for Writ of Certiorari	1
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statement	3
Specification of Errors to be Urged	5
Reasons for Granting the Writ	6
Conclusion	6
Brief in Support of the Petition	7
Argument	7
POINT I—An account receivable arising in the ordinary course of business is not a capital asset within the meaning of Section 117 of the Revenue Act of 1936	7
POINT II—Capital loss provisions of the Revenue Act of 1936 do not apply to bad debts	10
POINT III—A charge-off on the books of a partial bad debt need not be made simultaneously with the ascertainment of partial worthlessness but can be made at any time within the taxable year	11
Conclusion	13
Appendix	15

TABLE OF CASES CITED:

PAGE

Brushaber v. *Union Pacific Railroad Company*, 240 U. S. 1 8

Commissioner v. *MacDonald Engineering Co.*, 102 F. (2d) 942 .....6, 12

Hamlen v. *Welch*, 116 F. (2d) 413 .....6, 12

Lewellyn v. *Electric Reduction Co.*, 275 U. S. 243....6, 10

Pollock v. *Farmers Loan & Trust Co.*, 157 U. S. 429.. 8

Rubinkam v. *Commissioner*, 118 F. (2d) 148 .....6, 12

Spring City Foundry Co. v. *Comm.*, 292 U. S. 182...6, 10

OTHER AUTHORITIES CITED:

Constitution of the United States:
Sixteenth Amendment 8

Congressional Record, Vol. 78, p. 2663 9

Judicial Code, as amended by the Act of February 13, 1925:
Section 240(a) 2

Revenue Act of 1936:
Section 23(k) 11, 15
Section 117 .....4, 5, 7, 9, 10
Section 117(b) 7, 9, 15
Section 117(d) 9, 15

Treas. Reg. 94 (1936 Ed.):
Art. 23 (k)-1 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. .

MAURICE LEVY,

Petitioner,

v.

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Petitioner respectfully prays that a writ of certiorari issue to review a judgment of the Circuit Court of Appeals for the Second Circuit entered in the above cause on December 16, 1942.

Opinions Below.

The opinion of the Tax Court of the United States (R. 12-17) is reported in 46 B. T. A. 423. The opinion of the United States Court of Appeals for the Second Circuit (R. 27) has not been reported.

Jurisdiction.

The judgment of the United States Circuit Court of Appeals was entered December 16, 1942. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

For the calendar year 1937, the respondent disallowed a partial bad debt deduction in the amount of $13,283.84, contending that it was a capital loss and subject to the $2,000 capital loss limitation, because the debt was sold in the same year it was charged off for the amount to which it was written down and levied a deficiency assessment in the amount of $2,782.12. The Circuit Court of Appeals of the Second Circuit has affirmed the respondent's disallowance of the partial bad debt deduction because of the sale despite the fact that it conceded that the debt had become partially bad during the taxable year and had been properly charged off. The questions presented are:

I—Whether an account receivable can be a capital asset?

II—Whether a charge-off on a partial bad debt deduction can be made at any time during the taxable year?

III—Whether a deduction for a partial bad debt otherwise proper can be disallowed because of a subsequent sale of the underlying account within the taxable year?

Statement.

The facts as found by the Tax Court of the United States (R. 12-15) and by the Circuit Court of Appeals of the Second Circuit (R. 27) are as follows:

The petitioner is an individual engaged in the business of importing and manufacturing perfumery and toilet articles in New York City. In 1926 he organized Maurice Levy Co., Ltd., a Canadian company, to conduct a similar business in Montreal, Canada. At the time of the organization of the Canadian corporation, petitioner advanced cash to it and sold it merchandise and continued so to do thereafter. The amount representing the advance and sales was carried on petitioner's books as an account receivable. During the period 1926 to 1937 the only credits to this account were for payments made in 1931, 1933 and 1934 and for the return of merchandise in 1935. On December 31, 1936 the corporation had a deficit of $19,871.26 and as of April 22, 1937, the balance of the account due from the corporation to the petitioner was $27,837.84. Prior to September 1936, the corporation had manufactured for another corporation, Charles of the Ritz of Canada; this source of income being the corporation's only profitable one. In September 1936, the arrangement was changed so that Charles of the Ritz of Canada did its own manufacturing and the corporation shared to the extent of 50% of the net profits of Charles of the Ritz of Canada.

In March 1937, the petitioner determined that this new arrangement was unprofitable and that the likelihood of his ever collecting the entire amount due to him from the corporation was dubious. On April 27,

1937, W. N. Beauchamp, the manager of the Canadian corporation, offered to purchase petitioner's stock in the corporation for the sum of $2,200 and at the same time arrangements were made for the petitioner to sell his account due from the corporation to Beauchamp for the sum of $14,544 and the sale of this account was completed on June 19, 1937. Petitioner received the cash both from the sale of the stock and from the sale of the debt of the corporation and deposited both items in his personal bank account causing the amount received to be credited to his personal account on his books. On December 31, 1937, petitioner charged off the corporation's account and his investment in its stock by the following entry:

"Profit and Loss	$14,583.84	
Maurice Levy personal	16,754.00	
Maurice Levy, Ltd.		$27,837.84
Investment		3,500.00

To write off uncollectible investment and receivables."

On his income tax return for the calendar year 1937, petitioner claimed a deduction for a bad debt in the amount of $13,283.84, the difference between the amount of the debt $27,837.84 and its selling price $14,554.00. He also claimed a loss on the sale of the stock in the amount of $1,300, the difference between $3,500 and $2,200.

The respondent disallowed the $13,283.84 as a bad debt deduction on the ground that the loss sustained in that amount was a capital loss limited to $2,000 under the provisions of Section 117 of the Revenue Act of 1936. On appeal the Tax Court of the United States sustained the Commissioner's disallowance (R.

18) and on further appeal to the Circuit Court of Appeals, this order was affirmed (R. 31).

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In holding that an account receivable arising in the course of business is a capital asset within the meaning of Section 117 of the Revenue Act of 1936.

2. In holding that the charge-off of a partial bad debt must be made at the same time as its ascertainment of partial worthlessness.

3. In holding that a sale of a debt subsequent to the ascertainment of its partial worthlessness and prior to its charge-off results in the negating of its otherwise proper use as a partial bad debt deduction.

4. In holding that a deduction for a partial bad debt is governed by the loss provisions of the tax statutes.

5. In failing to hold that the conceded proper ascertainment of partial worthlessness and proper charge-off during the taxable year did not create a partial bad debt deduction.

6. In failing to hold that the subsequent sale of an account receivable previously ascertained to be partially worthless, had no effect upon its deduction as a partial bad debt.

7. In affirming the decision of the Tax Court of the United States.

Reasons for Granting the Writ.

The decision of the Circuit Court of Appeals, Second Circuit, in the instant case is in direct conflict with the principles enunciated by this Court in the cases of *Lewellyn* v. *Electric Reduction Co.*, 275 U. S. 243, and *Spring City Foundry Co.* v. *Comm.*, 292 U. S. 182, to the effect that the provisions in the tax statutes allowing deductions for losses and for bad debts are mutually exclusive and that losses on debts are not to be regarded as falling under the general provision for loss deductions. It is also in conflict with the decision of the Circuit Court of Appeals, First Circuit, in the case of *Hamlen* v. *Welch*, 116 F. (2d) 413, and with the decisions of the Circuit Court of Appeals, Seventh Circuit, in the cases of *Commissioner* v. *MacDonald Engineering Co.*, 102 F. (2d) 942, and *Rubinkam* v. *Commissioner*, 118 F. (2d) 148.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ANDREW B. TRUDGIAN,
Counsel for Petitioner.